NO. 45463-7-II

THE COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

HEINZ HENGSTLER,

Petitioner/Appellant

and

AMERICAN EXPRESS CENTURION BANK,

Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

Pierce County Cause's No. 12-2-13342-1 & 12-2-13343-9

APPELLANT'S BRIEF

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STATUTES

ASSIGNMENT OF ERRORS

1. Did the Superior court err when the court accepted the declaration of Richard Kier as testimony, over the objections of the defendant when the witness was not present in court to be cross-examined in violation of ER 602, 801& 802?

2. Did the Superior court err when the court accepted the counterfeit documents as legitimate records, over the objections of the defendant in violation ER 904 (c)?

3. Did the Superior court err when the court issued a summary judgment with issues still in dispute?

4. Did the Superior court err when there was no competent testimony before the court by the plaintiff and the court granted summary judgment anyway?

5. Did the Superior court err when the plaintiff had no facts before the court and the court granted summary judgment?

6. Did the Superior court err when plaintiff provided no evidence before the court and the court granted summary judgment?

7. Did the Superior court err when the court allowed the declaration of Richard Kier even though the declaration failed to state how declarant came to have any personal knowledge?

8. Did the Superior court err when the court failed to require proof of assignment or proof that the suit was authorized by American Express Centurion Bank after the defendant demanded such proof?

9. Did the Superior court err when the court accepted the opinions of counsel instead of evidence based on competent testimony?

10. Did the Superior court err when the court ignored the requirement for validating the alleged debt when demanded, pursuant to 15 USC § 1692 and all collection activities were to cease until the alleged creditor validates the debt. (including court action) or the alleged creditor violates Federal Law.

ISSUES

1. Pursuant to Haynes v. Kerner, the defendant appeared pro se and his pleadings were to be construed liberally, however the Superior court Judge court stated that defendant would be held to the same standards as an attorney. Did the judge err and if so did that prejudice defendant's rights?

2. Was there any evidence in the court records that an officer of American Express Centurion Bank had authorized the suit and if not was the complaint/information properly before the court?

3. Can a law firm prevail on a suit if challenged to produce proof that the alleged plaintiff authorized the suit if no such proof is produced?

4. There was never a witness for the plaintiff present in court to be cross-examined or testify, and the defendant objected pursuant to Rule 804, therefore was there any competent evidence or testimony before the court?

5. Without a witness to cross-examine, was defendant's rights prejudiced?

6. The declaration of the alleged witness failed to state that he had any first hand knowledge of any of the events or that the alleged plaintiff ever employed the alleged witness. Without actual first hand knowledge of any of the events in question, can the witness testify?

7. As an alleged "agent" that has only reviewed copies of alleged records can such "agent" testify to the events in question?

8. Without proof that the plaintiff authorized the action against defendant or proof of an assignment, was the action Ultra Vires?

STATEMENT OF THE CASE

Plaintiff is alleged to have sued defendant for a sum claimed to be due and owing on alleged credit card accounts in the amount of $25,411.39 and 6,180.66.

Defendant responded to plaintiff's claims, claiming amongst other things that there was no evidence that any Officer of American Express Centurion Bank had authorized the suit and the attorney for the law firm conducting the suit failed to deny or provide any evidence to the contrary. (See verbatim report Page 5 Line 5 line 5 through 25 and page 6 line 1-4)

The law firm allegedly representing the plaintiff provided no original documentation only counterfeits to which the defendant objected. (See verbatim report Page 6 line 3-7)

Defendant in discovery, asked for a copy of an assignment or a contract authorizing Suttell & Hammer to represent the plaintiff but no such evidence was presented. (See verbatim report Page 6 line 19-21)

Defendant asked the alleged plaintiff for production, admissions and interrogatories and counsel for plaintiff refused but stated that they were debt collectors.

Defendant demanded verification of the alleged debt pursuant to Title 15 U.S.C § 1692 and issued a general denial of the alleged debt. Plaintiff failed to verify the alleged debt.

Defendant asked for information by using discovery Request for Admissions and Interrogatories as to whether the alleged account was insured and if so then had there been any claim on the account and if whether any losses had been written off on plaintiff's taxes but Suttell & Hammer refused to provide any such information, just a general objection that the court failed to ruled on. (See Verbatim report Page 9 line 11-25)

Plaintiff moved for summary judgment and attached a declaration of Richard Kier in support of their claim, to which defendant objected to as hearsay, as the alleged witness did not have any personal knowledge of the account, was not employed by the plaintiff and did not keep the alleged account ledger and also was not present in court to be cross examined. (See Verbatim report Page 7 line 11-25, page 8 line 1-6, page 8 line 25, page 9 line 1-6)

Defendant had multiple facts in dispute and the court rendered summary judgment for plaintiff and against defendant.

ARGUMENT

THIS APPELLATE COURT IS NOTICED: STATEMENTS OF COUNSEL IN BRIEF OR IN ARGUMENT ARE NOT FACTS BEFORE THE COURT.

The court is further noticed: On the day of the hearing for determination on the summary judgment motions, the plaintiffs witness was not in appearance to be cross examined; Statements of counsel and brief or in argument are not sufficient for motion to dismiss or for summary judgment, *Trinsey v. Pagliaro.*

The record shows that the Superior Court was deprived of subject matter jurisdiction, as there was no evidence that the alleged plaintiff authorized the suit or a competent witness to testify for the plaintiff.

The declaration of plaintiff's only witness, Richard Kier was defective, as Richard Kier was a 3rd party interloper, did not witness any alleged acts, nor was he the creator of the records of transactions occurring between defendant and American Express Centurion Bank, he was not currently and had never been employed by American Express Centurion Bank and therefore could not have personal knowledge of how the alleged plaintiff's records were prepared and maintained and was unqualified to testify as to the truth of the information contained in those records. The information contained in his documents was merely an accumulation of hearsay and supposition. He appears to be employed as a professional witness and not subject to the hearsay business records exemption.

The alleged plaintiff is a National Lending Institution and is subject to Federal Law and the law firm allegedly representing plaintiff admits to being a debt collector. Defendant has asked for validation of the alleged debt pursuant to 15 USC § 1692 and all collection activities are to cease until the alleged creditor validates the debt. (including court action) or the alleged creditor violates Federal Law.

The defendant challenged and the law firm allegedly representing the plaintiff failed to provide any evidence on the record that they had an assignment or represented anyone other than themselves and also failed to have a competent witness to testify to the facts or issues before the court, therefore the defendant was deprived of his due process right to face the witness and to cross examine him in open court if only to determine the accuracy of his statements or even to determine if such a person exists.

The court accepted the declaration as testimony and business records even though the alleged witness failed to show that he had any personal knowledge of any of the events in question, how the records were created or by whom or even whether the declarant ever worked for the plaintiff or how he came to have such records. For all anyone knows the declarant found the counterfeit copies in a garbage can. Defendant was denied the opportunity to cross-examine the declarant.

It would appear that in Washington state, anyone can find records in the garbage, make any statement, supply any counterfeit documents and present it to the court as "legitimate business records", without the defendant being able to investigate or cross examine the alleged "witness" or the alleged "records", or for the law firm allegedly representing, to prove the action was authorized.

The law firm allegedly representing refused production of documents proving an assignment and refused to prove that any Officer of plaintiff authorized the suit and failed to answer any admissions and for the court accepted their claim as true, even without a witness present to be cross-examined, and over the objections of the defendant.

It would appear at this rate that there is no reason to even have to go to court to challenge a claim if a competent witness isn't necessary. Only statements of counsel appear necessary to win a case, contrary to *Trinsey v. Pagliaro,* D.C. Pa. 1964, 229 F. Supp. 647.

The standard of review for both dismissals and summary judgments is *de novo.* Cite omitted. *De novo* review of case No. 45463-7-II shows that defendant proved his case by entering facts on the record. The only testimony of record in support of plaintiff is by Richard Kern, who had no personal knowledge of anything other than his review of the alleged "records", and who was not present to testify or the be cross-examined, **WHICH DO NOT DISPUTE THE MATERIAL FACTS OF DEFENDANT'S CASE.**

APPELLANT'S FIRST POINT ON APPEAL

Although all competent jurists understand that appeal of summary judgment is considered *de novo*, to an extent, the decision of the court below should be reviewed for abuse of discretion as the record shows the court below: (1) Plaintiff had no facts before the court as plaintiff had no competent witness testifying before the court, only a hearsay declaration of Richard Kier which was objected to and who claimed in his declaration that he was an agent, not an employee of plaintiff, he was familiar with the records (because he reviewed them), not the keeper of the records and at that point became inadmissible hearsay. Plaintiff withheld information on who employs the

declarant so there was no presumption that the declarant in fact has personal knowledge of anything, or if declarant has personal knowledge of everything involved in the transaction and payments. Nor did declarant identify or describe the function of either plaintiff or the servicing agent.

Plaintiff's agent (declarant) stated that he was "familiar" with the books and records of plaintiff. He did not state that he is familiar with plaintiff's record keeping practices nor the method by which plaintiff maintains the accounts. The mere fact that declarant was only familiar with plaintiff's books and a record was an insufficient basis for their introduction into evidence.

That doesn't mean the declarant had personal knowledge, nor does declarant state he had such knowledge. Declarant probably got information from others (hearsay), and he does not identify himself as custodian of records for anyone on anything. Declarant also fails to state what his relationship is to the plaintiff. "Plaintiff's records" does not mean records in declarant's possession. How did declarant know how the entries are made and if so, by whom, under what authority and based upon what information?

Declarant lacked competency to state anything about the business process or record keeping of plaintiff.

Either declarant had first hand knowledge or... if he didn't have first hand knowledge then somehow he must have got information from people who had first hand knowledge. Defendant was denied the ability to cross-examine the declarant to find out how declarant would know anything about the plaintiff's records. Declarant stated that: "These books and records are kept in the ordinary course of business". He does not state by whom, or that he kept these records. It is very likely that these records were purchased from American Express Centurion Bank by a junk debt buyer.

Declarants' statement amounts to hearsay, and lack of competence to testify, because declarant is allowing that he might NOT have personal knowledge, which is the key component of a witness' competency to testify. The four elements being oath or affirmation, personal knowledge, recall and the ability to communicate information that is relevant to the case from his personal knowledge and recollection. Such is not the case here. There was a Lack of foundation for all the above reasons and the plaintiff should have have been denied a summary judgment.

(2) The court was deprived of subject matter jurisdiction for reason that the court's misapplication of the rules of civil procedure denied defendant/appellant of due process.

Appellant's second point on Appeal

(1) There was no substantiated amount due and owing by copies of invoices or any other corroboration presented by a competent witness to the record, just the unsubstantiated amount due by the hearsay declaration of Suttell & Hammes's declarant.

Appellant's third point on Appeal

The actions of plaintiff were ULTRA VIRES, denying the lower court of subject-matter jurisdiction. The United States Code, Title 12, Section 24, Paragraph 7 confers upon a bank the power to lend its money, not it's credit. In First National Bank of Tallapoosa vs. Monroe, 135 Ga 614; 69 S.E. 1123 (1911), the court, after citing the statue heretofore said, "The provisions referred to do not give power to a national bank to guarantee the payment of the obligations of others solely for their benefit, nor is there any authority to issue them through such power incidental of the business of banking. A bank can lend its money, not its credit." Meanwhile, they do it anyway from a profit motive, even though it flies in the face of their primary duty to protect people's money.

Appellant's fourth point on Appeal

De novo review of the record made in the court below shows defendant, not plaintiff, was entitled to summary judgment.

CONCLUSION

The Judge's misconduct is typical of the arrogated nonsense infesting America's courts fermenting a Constitutional crisis and the Judge should have denied the plaintiffs motion for summary judgment, due to facts in dispute, failure of plaintiff to submit competent testimony or argument regarding their Ultra Vires actions and should have stricken the plaintiffs declaration from the record.

Plaintiff had no witness in court testifying to anything, and the defendant objected, therefore the plaintiff presented the court with no facts to base a decision on regarding summary judgment and the court was deprived of subject matter jurisdiction. Also statements of counsel in briefs or arguments although enlightening are not a basis for granting a summary judgment.

Ideals of substantial justice and fair play, as well as proper administration of the rules of court, justly require reversing the decision of the Superior Court decision be overturned.

Respectfully submitted,

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2/13/2014

THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

HEINZ HENGSTLER Petitioner vs. AMERICAN EXPRESS CENTURION BANK Respondent	No. 45463-7-II CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date(s) stated below, I did the following:

On the 13th day of February, 2014, I

x☐ mailed by regular U.S. Certified Mail, postage prepaid; or

☐ hand-delivered

a true copy of the APPELLANT'S BRIEF to SUTTELL & HAMMER, P.S., P.O. Box C-90006, Bellevue, WA 98009.

Dated this 13th day of February 2014 in Tacoma (City), WA (State).

Heinz Hengstler
Signature

Heinz Hengstler
Print or Type Name